

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES B. TURNER and JOANNE K. LIPSON,)
husband and wife,)

Plaintiffs,)

v.)

FRASER'S BOILER SERVICE, INC.;)
ASBESTOS CORPORATION LIMITED;)
C.H. MURPHY/CLARK-ULLMAN, INC.;)
CROWN CORK & SEAL COMPANY, INC.;)
E.E. ZIMMERMAN COMPANY;)
FOSECO, INC.;)
GEORGIA-PACIFIC CORPORATION;)
HANSON PERMANENTE CEMENT, INC. f/k/a)
KAISER CEMENT CORPORATION;)
HEDMAN RESOURCES LIMITED, a/k/a)
HEDMAN MINES LTD.;)
INSULCO, INC.;)
KAISER GYPSUM COMPANY, INC.;)
KELLY-MOORE PAINT COMPANY, INC.;)
LOCKHEED SHIPBUILDING COMPANY;)
LONE STAR INDUSTRIES, INC., individually)
and as successor-in-interest to PIONEER SAND &)
GRAVEL COMPANY;)
McCANN-SHIELDS PAINT CO.;)
METROPOLITAN LIFE INSURANCE)
COMPANY;)
OGLEBAY NORTON COMPANY, individually)
and on behalf of its FERRO ENGINEERING)
DIVISION;)
OWENS-ILLINOIS, INC.;)
P-G INDUSTRIES, INC., as successor-in-interest)
to PRYOR GIGGEY CO., INC.;)

NO.

DEFENDANT LOCKHEED SHIPBUILDING
COMPANY'S NOTICE OF REMOVAL OF
ACTION UNDER 28 U.S.C. § 1442(A)(1)

King County Superior Court
Cause No. 13-2-17075-2 SEA

{APR1102650.DOC;1/12060.000034/ }

DEFENDANT LOCKHEED SHIPBUILDING COMPANY'S
NOTICE OF REMOVAL - 1

OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

1 PFIZER, INC.;)
 2 SABERHAGEN HOLDINGS, INC.;)
 3 SEEGOTT HOLDINGS, INC.;)
 4 THIEM CORPORATION, as successor by merger)
 5 to UNIVERSAL REFRACTORIES COMPANY;)
 6 UNION CARBIDE CORPORATION; and)
 7 VIGOR SHIPYARDS, INC., a subsidiary of)
 8 VIGOR INDUSTRIAL, as successor-in-interest to)
 9 TODD SHIPYARDS)

10 Defendants.)

11 TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE
 12 WESTERN DISTRICT OF WASHINGTON:

13 PLEASE TAKE NOTICE that defendant Lockheed Shipbuilding Company ("Lockheed
 14 Shipbuilding"), by and through its undersigned counsel of record, removes the above-entitled
 15 action from the Superior Court of the State of Washington, in and for the County of King, to this
 16 Court, pursuant to 28 U.S.C. §§ 1442(a)(1) and 1446.

17 This action is a civil action over which this Court has subject matter jurisdiction under
 18 28 U.S.C. § 1331, as the action arises under the Constitution, laws, or treaties of the United
 19 States within the meaning of 28 U.S.C. § 1331 by virtue of plaintiffs' attempt to adjudicate
 20 claims with respect to persons acting under an officer of the United States pursuant to 28 U.S.C.
 21 § 1442(a)(1).

22 The grounds for removal are as follows:

23 1. On April 16, 2013, plaintiffs filed this action in the Superior Court of the State of
 24 Washington in and for the County of King, entitled *Turner v. Fraser's Boiler Service, Inc., et al.*,
 25 Case No. 13-2-17075-2 SEA. (André Decl., Ex. 1).¹ Plaintiffs claimed that Lockheed
 26 Shipbuilding is liable for alleged asbestos-related injuries to plaintiff James B. Turner III, on
 theories of product liability, negligence, conspiracy, spoliation, willful or wanton misconduct,
 strict product liability, premises liability, breach of warranty, RCW 62A, enterprise liability,

¹ The Declaration of Robert G. André is filed together with this Notice.

1 market-share liability and/or market-share alternate liability, and perhaps other grounds. (André
2 Decl., Ex. 1).

3 2. Pursuant to 28 U.S.C. § 1446(b), the case as stated by the initial Complaint was
4 not removable because plaintiffs did not identify the particular circumstances of James B.
5 Turner's alleged exposure to asbestos from Lockheed Shipbuilding. Although plaintiffs alleged
6 that James B. Turner III's father worked as a pipefitter at Lockheed Shipbuilding's premises,
7 they did not identify any vessels or types of vessels upon which they allege that James B. Turner
8 III's father worked. Nor did they specify whether James B. Turner III's father was alleged to
9 have worked on military or civilian vessels. (*See* André Decl., Ex. 1).

10 3. Lockheed Shipbuilding did not have notice that the case was removable until
11 September 5, 2013, when James B. Turner III's sister, Rozellen Beard, testified at her deposition
12 that their father worked on military ships at Lockheed Shipbuilding. (André Decl., Ex. 2).

13 4. Lockheed Shipbuilding is therefore filing this Notice of Removal within thirty
14 (30) days after receipt of "an amended pleading, motion, order or other paper from which it may
15 first be ascertained that the case is one which is or has become removable," as required by
16 28 U.S.C. § 1446(b):

17 A civil action or criminal prosecution commenced in a State court against
18 any of the following may be removed by them to the district court of the
19 United States for the district and division embracing the place wherein it
is pending:

20 (1) The United States or any agency thereof or any officer (or any person
21 acting under that officer) of the United States or of any agency thereof,
22 sued in an official or individual capacity for any act under color of such
office or on account of any right, title or authority claimed under any Act
of Congress for the apprehension or punishment of criminals or the
collection of the revenue.

23 The basis for the removal of this action is that it involves a person—Lockheed
24 Shipbuilding—that acted under the authority of officers of the United States or any agency
25 thereof, in this case, the United States Navy, within the meaning of 28 U.S.C. § 1442(a)(1).
26

1 *Mesa v. California*, 489 U.S. 121, 124-25; 109 S. Ct. 959 (1989); *Pack v. AC&S, Inc.*, 838 F.
2 Supp. 1099, 1101 (D. Md. 1993).

3 5. In *Fung v. Abex Corp.*, 816 F. Supp. 569 (N.D. Cal. 1993), the court addressed the
4 propriety of the removal of a case involving the alleged exposure to asbestos while aboard
5 submarines manufactured by General Dynamics. In denying plaintiffs' motion to remand, the
6 Court stated that, to satisfy removal under 28 U.S.C. § 1442(a), General Dynamics must show
7 that, in manufacturing submarines, it: "(1) acted under the direction of a federal officer,
8 (2) raised a federal defense to plaintiffs' claims, and (3) demonstrated a causal nexus between
9 plaintiffs' claims and the acts it performed under color of federal office." *Id.* at 571-72.

10 6. In *Bouchard v. CBS Corp.*, 2012 WL 1344388 (E.D. Penn.), the United States
11 District Court denied the plaintiffs' motion to remand a case that was removed by Lockheed
12 Shipbuilding under similar circumstances. The court ruled, initially, that Lockheed
13 Shipbuilding's removal notice was timely, where the complaint did not specify whether military
14 ships were at issue and where Lockheed Shipbuilding removed the action within thirty days after
15 a witness testified that he had seen the plaintiff's ex-husband work aboard military vessels at
16 Lockheed Shipbuilding. *Id.* at *3-*8. The court then ruled that federal officer jurisdiction was
17 proper because a claim against Lockheed Shipbuilding, based on exposure to asbestos alleged to
18 have resulted from work performed on U.S. Navy ships, satisfied the three elements for federal
19 officer removal. *Id.* at *8-*11.

20 7. In the present case, during the relevant time period, Lockheed Shipbuilding was
21 involved in the construction and maintenance of vessels for the U.S. Navy. For the purposes of
22 this removal, Lockheed Shipbuilding acknowledges having constructed, converted or repaired
23 vessels for the U.S. Navy at its Seattle facility. However, such construction, conversion or repair
24 was necessarily performed pursuant to government contracts and specifications executed by an
25 officer of the United States representing the U.S. Navy.
26

1 8. Lockheed Shipbuilding's construction, conversion or repair of vessels for the U.S.
2 Navy was performed pursuant to: (a) contracts that mandated adherence to comprehensive and
3 detailed government-created specifications regarding, among other things, the use of asbestos-
4 containing products, and (b) repair oversight by on-site representatives of the federal
5 government. Therefore, under the terms of its contracts with the United States, Lockheed
6 Shipbuilding's construction, conversion or repair of vessels for the federal government was
7 necessarily performed under the authority and control of an officer of the United States. Thus,
8 during all phases of Lockheed Shipbuilding's construction, conversion or repair of vessels for the
9 federal government, pursuant to federal contracts and specifications, Lockheed Shipbuilding
10 performed its work under the control and supervision of federal officers. (*See Horne Decl.*)²

11 9. Moreover, Lockheed Shipbuilding can and will assert a federal defense to this
12 action. Its work was performed pursuant to contracts with, and under the supervision of, the
13 United States government, and any recovery by plaintiff is barred by the judicially recognized
14 doctrine of immunity conferred upon that contractual relationship and any occurrences arising
15 therefrom, otherwise known as the government contractor defense. *Boyle v. United*
16 *Technologies Corp.*, 487 U.S. 500, 509-11; 108 S. Ct. 2510 (1988); *Niemann v. McDowell*
17 *Douglas Corp.*, 721 F. Supp. 1019, 1021-23 (S.D. Ill. 1989).

18 10. Further, Lockheed Shipbuilding is entitled to the distinct federal defense of
19 derivative sovereign immunity, which states that a private company like Lockheed Shipbuilding
20 that contracts with the federal government to perform the duties of the government will not be
21 held liable for its actions on behalf of the government. *See Yearsley v. W.A. Ross Construction*
22 *Co.*, 309 U.S. 18 (1940); *see also City of Worcester v. HCA Management Co., Inc.*, 753 F. Supp.
23 31, 37 (D. Mass. 1990).

24 11. Finally, because Lockheed Shipbuilding acted under color of a federal officer or
25 agency in its construction, conversion or repair of any United States vessels on which James B.

26 ² The Declaration of Ret. Admiral Roger B. Horne is filed together with this Notice.

1 Turner III's father worked and from which plaintiff James B. Turner III claims he was exposed
 2 to asbestos-containing materials, removal of this civil action pursuant to 28 U.S.C. § 1442(a)(1)
 3 is proper. *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247 (9th Cir. 2006); *Williams v. Brooks*,
 4 945 F.2d 1322, 1325 n.2 (5th Cir. 1991); *Ballenger v. AGCO Corp.*, 2007 U.S. Dist. LEXIS
 5 47042 (June 22, 2007 N.D. Cal.).

6 12. Should plaintiff file a motion to remand this case, Lockheed Shipbuilding
 7 respectfully requests an opportunity to respond more fully in writing, including the submission of
 8 affidavits and authorities.

9 13. As Lockheed Shipbuilding was acting under an officer of the United States of
 10 America pursuant to 28 U.S.C. § 1442(a)(1), Lockheed is not required to notify and obtain the
 11 consent of any other defendant in this action in order to remove plaintiffs' action as a whole
 12 under 28 U.S.C. § 1442(a)(1). *Ely Mines, Inc. v. Hartford Accident & Indem. Co.*, 644 F.2d
 13 1310, 1315 (9th Cir. 1981); *National Audubon Soc. v. Department of Water & Power*, 496 F.
 14 Supp. 499, 509 (E.D. Cal. 1980).

15 14. Written notice of the filing of this Notice of Removal will be given to plaintiffs
 16 and to the other defendants in this action, together with a copy of the Notice of Removal to
 17 plaintiffs and supporting papers with the Superior Court of Washington, County of King, as
 18 required by 28 U.S.C. § 1446(d).

19 15. This Court is the District Court of the United States for the district and division
 20 embracing the place where the state court action was filed and is, therefore, the appropriate
 21 venue for this removal. 28 U.S.C. § 1441(a).

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1 WHEREFORE, Lockheed Shipbuilding hereby removes this action to this Court.

2 DATED this 27th day of September, 2013.

3 OGDEN MURPHY WALLACE, P.L.L.C.

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5 By s/Robert G. André
6 Robert G. André, WSBA #13072
7 Attorneys for Defendant
8 Lockheed Shipbuilding Company
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